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No. 108, Original

In The
Supreme Court of the United States
October Term, 1994

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

**WYOMING MOTION FOR LEAVE TO FILE
A REPLY BRIEF AND WYOMING REPLY BRIEF
IN SUPPORT OF WYOMING'S EXCEPTIONS
TO THE THIRD INTERIM REPORT
OF THE SPECIAL MASTER**

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**WYOMING MOTION FOR LEAVE
TO FILE A REPLY BRIEF**

The State of Wyoming requests leave of the Court to file the accompanying brief replying to the Brief for the United States Opposing Exceptions and to Nebraska's Response to Wyoming's Exceptions to the Special Master's Third Interim Report. The grounds for this motion are:

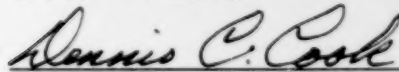
Wyoming's reply brief is tendered for filing within the time limits provided by Sup.Ct.R. 25.3.

Wyoming's reply brief responds to incorrect statements in the United States' and Nebraska's briefs that attempt to distinguish the basis for relief in Wyoming's proposed First Counterclaim and First Cross-Claim from the basis for relief in Nebraska's Counts I and III. In addition, Wyoming's reply brief points out that Nebraska and the United States would have the Court

apply different and inconsistent standards to Nebraska's and Wyoming's amended pleadings. Wyoming respectfully submits that application of these arguments will further demonstrate to the Court why the United States' and Nebraska's arguments provide no basis for overruling Wyoming's exceptions.

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The purpose of this brief is to correct the suggestion by Nebraska and the United States that the relief sought in Wyoming's First Counterclaim and First and Fourth Cross-Claims is fundamentally different from the relief sought in Nebraska's Counts I and III. Nebraska and the United States object to Wyoming's claims because those claims could result in a quantification of Nebraska's apportionment. However, they ignore the fundamental fact that Nebraska's Counts I and III similarly require that Nebraska quantify its apportionment to show injury from additional Wyoming depletions.

This brief also highlights the inconsistency of the United States and Nebraska arguments that support Decree modifications requested by Nebraska while arguing that the Decree modifications requested by Wyoming are off-limits. That inconsistency is exemplified by the United States' argument that "this Court's 1993 decision does not bar Nebraska seeking relief beyond that provided in the existing apportionment" which is followed immediately by the argument that there is no justification to consider modification of the Decree's percentage-based division of only natural flows in light of changed conditions or experience. Brief For the United States Opposing Exceptions of the State of Wyoming at 10-11. *See also* Nebraska's Response to Wyoming's Exceptions to the Special Master's Third Interim Report at 24-29. In addition to the fact that Nebraska's and the United States' arguments suffer from an unexplained inconsistency, their arguments ignore the Court's previous decisions and their own pleading decisions that shape and define these proceedings.

The questions presented by Wyoming's exceptions, the jurisdictional basis for the relief Wyoming requests and the basic facts supporting Wyoming's exceptions have been stated previously and therefore are not repeated in this brief.

ARGUMENT

I. Wyoming's Claims are not Objectionable for Attempting to Define or Quantify Nebraska's Apportionment When Nebraska's Claims for Additional Injunctions Against Wyoming Also Require Proof of Nebraska's Apportionment in Terms of a Quantity of Water.

Throughout this case, Nebraska and the United States have contended that additional depletions in Wyoming on Deer Creek and on the Laramie River, violate Nebraska's apportionment by reducing the amount of natural flow available for apportionment in the pivotal reach and by reducing carryover storage in the federal reservoirs. The Court in 1993 denied Wyoming summary judgment because it found a genuine issue of fact as to whether Wyoming's Deer Creek and Laramie River depletions would so reduce storage in the federal reservoirs and natural flows in the pivotal reach as to injure Nebraska users under the canals in the pivotal reach. *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1699-1700 (1993). Counts I and III of Nebraska's tendered amended petition contain, inter alia, the same allegations of injury from new depletions on Deer Creek and the Laramie. Now, however, in opposition to Wyoming's exceptions, Nebraska and the United States argue that

Nebraska's apportionment cannot be defined or quantified without going beyond the limits of this case. Those arguments ignore the obvious fact that Nebraska's Counts I and III claim that further depletions in Wyoming would deny Nebraska a quantity of water that is part of Nebraska's equitable apportionment.

As the Court recognized in its 1993 decision, for Nebraska to succeed in its claims, Nebraska must demonstrate by clear and convincing evidence that the alleged new depletions cause or will cause serious injury to Nebraska's apportionment. *Nebraska v. Wyoming*, 113 S.Ct. at 1696. In other words, Nebraska must prove the need for protection of a quantity of water to support additional restrictions on Wyoming's use. Any notion that Nebraska need prove only a general reduction in pivotal reach flows in order to have additional injunctions restraining Wyoming's use was soundly rejected by the Court in 1993 when it denied Nebraska's summary judgment motion which claimed that the existing Decree implicitly required the maintenance of the historical contributions of the Laramie River to the North Platte. *Nebraska v. Wyoming*, 113 S.Ct. at 1698.

Neither Nebraska's initial claims nor its proposed Counts I and III claim that Wyoming has ever violated Paragraph V of the Decree by denying Nebraska its apportioned seventy-five percent of the natural flow "in the Guernsey Dam to Tri-State Dam section" during the irrigation season. See First Interim Report of the Special Master at 25 (Docket No. 140); See also Transcript July 26, 1993 Hearing at 171-173 (Docket No. 688). Instead, Nebraska claims that proposed and present uses of water in Wyoming violate Nebraska's apportionment by depleting the amount of flow into the piv-

otal section to the point that seventy-five percent of the resulting natural flow in the section together with federal storage water is insufficient to meet Nebraska's equitable claims in that section.¹ In other words, Nebraska's claims are predicated on the concept that there is a threshold quantity of storage and natural flow water available in the pivotal reach that defines Nebraska's apportionment.

Wyoming's initial counterclaims and now its proposed First Counterclaim, First Cross-Claim and, to some extent, its Fourth Cross-Claim simply present the other side of Nebraska's claims. Where Nebraska claims that it is not going to get "enough water" as a result of certain Wyoming actions, Wyoming's counterclaim and cross-claims would define how much water is "enough water" for Nebraska. The injunctive relief that Wyoming seeks is to insure that when Nebraska has had "enough water" it will not continue to demand water from Wyoming or from federal reservoirs and waste that water to the detriment of Wyoming uses. Therefore to the extent that Nebraska's claims to a threshold quantity of storage and natural flow water under the apportionment are justiciable in this case, Wyoming's First Counterclaim and First and Fourth Cross-Claims are justiciable as well.

1. Natural flow amounts to approximately one-half of the water diverted in the pivotal reach; the remaining water is storage water transferred into the reach from federal reservoirs. See Brief of the State of Wyoming in Response to Exceptions of the State of Nebraska and the United States to the Third Interim Report of the Special Master at 5. Also, all of the Nebraska lands served from that reach have federal storage water contracts.

Nebraska and the United States argue that any Wyoming claim that conceivably could lead to a quantification of Nebraska's apportionment is beyond the scope of this case. They argue that because the Court rejected Wyoming's claim for a mass allocation of both natural flow and storage water in the earlier case, any attempt now to quantify or define Nebraska's apportionment must be denied without any consideration of the facts that may support that type of solution to the current competing claims. However, if the Court accepts the argument that any quantification of Nebraska's apportionment is off-limits in this case, then it must reject Nebraska's Counts I and III in their entirety as well as Nebraska's existing Laramie and Deer Creek claims. To avoid the inconsistency inherent in the position taken by Nebraska and the United States the Court should recognize that Wyoming's First Counterclaim and First Cross-Claim, like the Deer Creek and Laramie River Claims in Nebraska's Count I and Count III, fall within the limits of this case as defined in the Court's 1993 opinion.

Although Nebraska suggests that Wyoming has concealed a claim for a mass allocation of water in its First Counterclaim and First Cross-Claim, that is not accurate. Wyoming does not deny that the quantification of Nebraska's apportionment required in the trial of Nebraska's Counts I and III as well as Wyoming's Counterclaims and Cross-Claims might identify the need for a mass allocation. On the other hand, there might be other types of relief that would control Nebraska's waste without necessarily quantifying a numerical limit on Nebraska's apportionment. For example, Wyoming's evidence might identify specific feasible conservation measures that Nebraska or

the United States should be required to adopt in the pivotal reach.²

The point that should compel the Court to accept Wyoming's amended counterclaims and cross-claims is that Wyoming's request that the Court more clearly define and quantify Nebraska's apportionment in light of changed conditions is no different than Nebraska and

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2. There is no merit to Nebraska's argument that accepting claims that involve questions of efficiency or of beneficial use would take the Court into new and unfamiliar territory. See Nebraska Response Brief at 16-18. In *Colorado v. New Mexico*, 459 U.S. 176 (1982) the Court recognized that the efficient use of the apportioned water supply is central to the equitable apportionment of an interstate stream:

Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are "reasonably required and applied." *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922) Thus, wasteful or inefficient uses will not be protected. [citing *Nebraska v. Wyoming*, 325 U.S. at 618]

We have invoked equitable apportionment not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream.

Id. at 184-85.

Furthermore, the difficulty of Wyoming's task with regard to proving its overdiversion claims is irrelevant when considering whether to accept Wyoming's amended pleadings. Nevertheless, in its effort to paint the determination of beneficial use as overly complicated, Nebraska fails to mention the ease with which the Nebraska Department of Water Resources and the Nebraska Supreme Court determined beneficial use in a case involving Wyoming and water use in the central Platte. See *Central Platte Natural Resources District v. Wyoming*, 245 Neb. 439, 513 N.W. 2d 847 (1994).

the United States asking the Court to reconsider the need for restrictions on tributaries or the need for limits on Wyoming's use of the lower Laramie River. The ultimate scope or form of relief that the Court might adopt on either Nebraska's or Wyoming's claims should not be predetermined at this stage of the proceeding. The fashioning of relief should follow trial. At this stage the Court should determine which claims are within the proper scope of this suit to give effect to the existing apportionment.

II. The Briefs in Opposition to Wyoming's Exceptions Fail to Acknowledge that the Court has not Expanded this Case to Consider a New or Expanded Equitable Apportionment and that Nebraska has Conceded that its Proposed Claims to Expand this Case are not Ripe.

Throughout these proceedings, there have been certain decisions by the Court and the parties that have shaped and defined this case. The Court's 1993 decision on cross-motions for summary judgment was such a decision just as the Court's denial of Nebraska's two previous attempts to add downstream uses to this case have also defined this case. *Nebraska v. Wyoming*, 485 U.S. 931 (1988), *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). Similarly, Nebraska's and Wyoming's pleadings as well as their reactions to the Special Master's recommendations to their respective amended pleadings also define these proceedings. However, in the descriptions of the case and arguments in opposition to Wyoming's exceptions, neither the United States nor Nebraska account for the Court's denial of Nebraska's two previous attempts to

expand the geographic limits of the existing apportionment. Moreover, neither the United States nor Nebraska acknowledge that by declining to take exception to the Special Master's recommendation to deny Nebraska's proposed Count IV for "lack of ripeness", they concede that Count IV is not ripe. Third Interim Report at 47. Nebraska's Count IV represents Nebraska's third attempt to expand the geographic limits of the apportionment.

Wyoming has tried to give effect to the Court's previous denials of Nebraska's attempts to expand the geographic limits of the apportionment. Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 4 (Docket No. 624); Wyoming Brief in Support of Exceptions to the Third Interim Report of the Special Master at 14-15. In response, Nebraska argues that "[t]he question before the Court which cuts through the discrete issues framed by the proposed pleading amendments is whether evidence of changed conditions over the past fifty years will be relevant in those areas where Wyoming and Nebraska are now seeking to modify the Decree." Nebraska Response at 9. When it comes to its own claims, Nebraska appears to continue to argue that the evidence of "changed conditions" extends to alleged post-decree uses in Nebraska downstream of the apportionment. However, when it comes to Wyoming's claims to modify the Decree within the limits of the existing apportionment, Nebraska and the United States argue that Wyoming's claims seek a new apportionment and are therefore beyond the narrow limits of this case.³

3. Nebraska and the United States suggest that Wyoming is inconsistent when it argues that the Court should accept Wyoming's claims for new injunctive relief against Nebraska but reject

Even if Nebraska's and the United States' arguments were not irreconcilable, they must fail because they mischaracterize Wyoming's claim and ignore their own decision to concede their downstream claims. See Argument I, *supra*.

In fact, the changed conditions that the Court has agreed to consider are those that can affect the existing apportionment to Nebraska lands served by diversions in the pivotal reach. Any claims to reweigh equities to protect Nebraska's post-Decree developments downstream in the Central Platte would constitute a new apportionment and such claims have been specifically rejected by the Special Master and the Court. Moreover, by declining to take exception to the recommended denial of Nebraska's proposed Count IV, Nebraska and the United States have backed away from directly claiming a new or expanded apportionment that would include downstream uses. Whether downstream issues are ripe is irrelevant now because those issues are no

Nebraska's claims that would expand the geographic limits of the apportionment. To the contrary, Wyoming acknowledges the limited scope of this case as defined by the Court's previous orders denying Nebraska leave to amend. Consequently Wyoming has limited the relief sought in its counterclaims to that believed necessary to give effect to the geographically limited apportionment fashioned by the Court in 1945. If the Court were now to change course and to open this case to a complete reweighing of the equities and to consider Nebraska claims for an expanded apportionment, Wyoming certainly would seek further relief. Such further relief could be the release of present restrictions in the Decree by reason of increased supplies since 1945 (See *Nebraska v. Wyoming*, 325 U.S. 589, 620 (1945); Doherty Report at 10-11, 121-122) or changed or new injunctions to account for the effect on upstream areas of the addition of downstream storage such as Lake McConaughy in Nebraska since 1945. (See ¶ XIII(b) of Decree.)

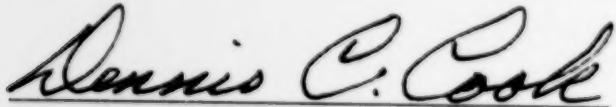
longer present. The Court should not allow Nebraska to claim indirectly through its Counts I and III that same expanded apportionment that was directly requested in Count IV.

CONCLUSION

The Court should sustain Wyoming's exceptions to the Third Interim Report of the Special Master.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Dennis C. Cook". The signature is written in dark ink and is positioned above the printed name.

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